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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY OF WESTLAND POLICE AND FIRE RETIREMENT SYSTEM and PLYMOUTH COUNTY RETIREMENT SYSTEM, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. SONIC SOLUTIONS, et al., Defendants.	No. C 07-05111-CW CLASS ACTION LEAD COUNSEL'S NOTICE OF MOTION AND MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF DATE: April 8, 2010 TIME: 2:00 p.m. COURTROOM: The Honorable Claudia Wilken

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TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on April 8, 2010, at 2:00 p.m., in the Courtroom of the Honorable Claudia Wilken, United States District Judge, at the United States Courthouse, 1301 Clay Street, Oakland, California, Lead Counsel will and hereby do move for an award of attorneys' fees and expenses. This motion is based upon the Memorandum of Points and Authorities in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses, the Joint Declaration of Shawn A. Williams and Jonathan Gardner in Support of Final Approval of Class Action Settlement, Plan of Allocation of Settlement Proceeds, and Award of Attorneys' Fees and Expenses ("Joint Decl."), the Declaration of Joy Ann Bull Filed on Behalf of Coughlin Stoia Geller Rudman & Robbins LLP in Support of Application for Award of Attorneys' Fees and Expenses, the Declaration of Joy Ann Bull in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses, and the Declaration of Jonathan Gardner Filed on Behalf of Labaton Sucharow LLP in Support of Application for Award of Attorneys' Fees and Expenses, submitted herewith, the Stipulation of Settlement dated as of October 12, 2009, and all other pleadings and matters of record.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Lead Counsel negotiated a settlement consisting of $5,000,000 in cash.[1] For their efforts in achieving this result, Lead Counsel seek a benchmark fee of 25% of the Settlement Fund plus payment of $186,767.89 in expenses.[2]

The Joint Declaration details the work performed over the past 2 years for the benefit of the Settlement Class, including an extensive pre-filing investigation, locating and interviewing potential witnesses, successfully opposing in part Defendants' motion to dismiss, and participating in

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[1] All capitalized terms not defined herein shall have the same meanings set forth in the Stipulation of Settlement dated as of October 12, 2009.

[2] The amount awarded will compensate Lead Counsel and may also be used to compensate counsel who have advised or worked with the Lead Plaintiffs for the benefit of the Settlement Class or contributed to the institution, prosecution, or resolution of the Litigation. The amount requested includes all such payments.

prolonged settlement discussions. Lead Counsel spent considerable time and resources to develop a case that they believe would have ultimately survived the pleading requirements of the Private Securities Litigation Reform Act of 1995 ("PSLRA") and convince Defendants that the Lead Plaintiffs were prepared to pursue this matter to trial if necessary. A comprehensive description of the claims asserted by the Lead Plaintiffs, as well as the efforts expended by Lead Counsel, are set forth in the Joint Declaration.

The 25% benchmark fee requested is more than fair and reasonable when considered under the applicable standards and, as discussed below, is well within the normal range of awards made in contingent fee matters of this type, particularly in view of the result achieved and the considerable risks attendant in bringing and pursuing this Litigation. This case involved complex issues, including proof of scienter, loss causation, and damages. The legal issues presented a significant risk that Lead Plaintiffs would spend several more years at sizable cost and would not obtain a better recovery (or any recovery at all) for the Settlement Class.

For the reasons set forth herein, and in the Joint Declaration, we respectfully submit that the requested attorneys' fees and expenses are fair and reasonable under the applicable legal standards and, in light of the significant risks faced and the excellent result achieved, should be awarded by this Court.

II. FACTUAL AND PROCEDURAL HISTORY OF THE LITIGATION

The Joint Declaration is an integral part of this submission. The Court is respectfully referred to it for a detailed description of the factual and procedural history of the Litigation, the claims asserted, the extensive investigation and informal discovery undertaken, the settlement negotiations, as well as the numerous risks and uncertainties presented in this Litigation.

III. AWARD OF ATTORNEYS' FEES

A. The Legal Standards Governing the Award of Attorneys' Fees in Common Fund Cases Support the Requested Award

1. A Reasonable Percentage of the Fund Recovered Is the Appropriate Method for Awarding Attorneys' Fees in Common Fund Cases

For their efforts in creating a common fund for the benefit of the Settlement Class, Lead Counsel seek a reasonable percentage of the fund recovered as attorneys' fees. The percentage method of awarding fees has become an accepted, if not the prevailing method, for awarding fees in common fund cases in this Circuit and throughout the United States.

It has long been recognized in equity that "a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). The purpose of this doctrine is to avoid unjust enrichment so that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("*WPPSS*"). This rule, known as the common fund doctrine, is firmly rooted in American case law. *See, e.g.*, *Trustees v. Greenough*, 105 U.S. 527 (1882); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).[3]

In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the Supreme Court recognized that under the "common fund doctrine" a reasonable fee may be based "on a percentage of the fund bestowed on the class." In this Circuit, the district court has discretion to award fees in common fund cases

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[3] In *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268 (9th Cir. 1989), the Ninth Circuit explained the principle underlying fee awards in common fund cases:

> Since the Supreme Court's 1885 decision in [*Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885)], it is well settled that the lawyer who creates a common fund is allowed an ***extra*** reward, beyond that which he has arranged with his client, so that he might share the wealth of those upon whom he has conferred a benefit. The amount of such a reward is that which is deemed "reasonable" under the circumstances.

Id. at 271 (citations omitted, emphasis in original).

based on either the so-called lodestar/multiplier method or the percentage-of-the-fund method. *WPPSS*, 19 F.3d at 1296. In *Paul, Johnson*, 886 F.2d 268, *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993), and *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002), the Ninth Circuit expressly approved the use of the percentage method in common fund cases. Moreover, supporting authority for the percentage method in other circuits is overwhelming.[4]

Since *Paul, Johnson* and its progeny, district courts in this Circuit have almost uniformly shifted to the percentage method in awarding fees in representative actions. The rationale for compensating counsel in common fund cases on a percentage basis is sound. First, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated by a percentage of the recovery.[5] Second, it more closely aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in

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[4] Courts in other circuits favor the percentage-of-recovery approach for the award of attorneys' fees in common fund cases. Two circuits have ruled that the ***percentage method is mandatory in common fund cases***. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991). Other circuits and commentators have expressly approved the use of the percentage method. *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (citing footnote 16 of *Blum* recognizing both "implicitly" and "explicitly" that a percentage recovery is reasonable in common fund cases); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 254 (Oct. 8, 1985).

[5] Courts are encouraged to look to the private marketplace in setting a percentage fee:

> The judicial task might be simplified if the judge and the lawyers [spent] their efforts on finding out what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character. This was a contingent fee suit that yielded a recovery for the "clients" (the class members) of $45 million. The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client. Suppose a large investor had sued Continental for securities fraud, and won $45 million. What would its lawyers have gotten pursuant to their contingent fee contract?

In re Cont'l Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992). *See also Phemister v. Harcourt Brace Jovanovich, Inc.*, No. 77 C 39, 1984 U.S. Dist. LEXIS 23595, at *40-*41 (N.D. Ill. Sept. 14, 1984).

the shortest amount of time.[6] Indeed, one of the nation's leading scholars in the field of class actions and attorneys' fees, Professor Charles Silver of the University of Texas School of Law, has concluded that the percentage method of awarding fees is the only method of fee awards that is consistent with class members' due process rights. Professor Silver notes:

> ***The consensus that the contingent percentage approach creates a closer harmony of interests between class counsel and absent plaintiffs than the lodestar method is strikingly broad.*** It includes leading academics, researchers at the RAND Institute for Civil Justice, and many judges, including those who contributed to the Manual for Complex Litigation, the Report of the Federal Courts Study Committee, and the report of the Third Circuit Task Force. Indeed, it is difficult to find anyone who contends otherwise. No one writing in the field today is defending the lodestar on the ground that it minimizes conflicts between class counsel and absent claimants.
>
> ***In view of this, it is as clear as it possibly can be that judges should not apply the lodestar method in common fund class actions.*** The Due Process Clause requires them to minimize conflicts between absent claimants and their representatives. The contingent percentage approach accomplishes this.

Charles Silver, *CLASS ACTIONS IN THE GULF SOUTH SYMPOSIUM: Due Process and the Lodestar Method: You Can't Get There from Here*, 74 Tul. L. Rev. 1809, 1819-20 (June 2000) (emphasis added, footnotes omitted).[7] This is particularly appropriate in PSLRA cases where Congress recognized the propriety of the percentage method of fee awards.[8]

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[6] In *Kirchoff v. Flynn*, 786 F.2d 320, 325, 326 (7th Cir. 1986), the court stated:

> The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains. . . . The unscrupulous lawyer paid by the hour may be willing to settle for a lower recovery coupled with a payment for more hours. Contingent fees eliminate this incentive and also ensure a reasonable proportion between the recovery and the fees assessed to defendants. . . .
>
> At the same time as it automatically aligns interests of lawyer and client, rewards exceptional success, and penalizes failure, the contingent fee automatically handles compensation for the uncertainty of litigation.

[7] Professor Coffee also argues that a percentage of the recovery is the only reasonable method of awarding fees in common fund cases:

> If one wishes to economize on the judicial time that is today invested in monitoring class and derivative litigation, the highest priority should be given to those reforms that restrict collusion and are essentially self-policing. The percentage of the recovery fee award formula is such a "deregulatory" reform because it relies on incentives rather than costly monitoring. Ultimately, this "deregulatory" approach is the only alternative . . . .

2. A Fee of 25% of the Fund Created Is Reasonable

In *Paul, Johnson*, the Ninth Circuit established 25% of the fund as the "benchmark" award for attorneys' fees. 886 F.2d at 272; *see also Torrisi*, 8 F.3d at 1376 (reaffirming 25% benchmark); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (same). The guiding principle in this Circuit is that a fee award be "'reasonable under the circumstances.'" *WPPSS*, 19 F.3d at 1296 (citation and emphasis omitted). In view of the result obtained, the contingent fee risk and the financial commitment of Lead Counsel, an award of 25% of the recovery obtained for the Settlement Class is appropriate.

B. Consideration of the Relevant Factors Used by Courts in the Ninth Circuit Justifies a Fee Award of 25% in This Case

Lead Counsel submit that, as the factors discussed below demonstrate, attorneys' fees of 25% of the fund recovered for the Settlement Class are reasonable under the circumstances of this case and should be approved.

1. The Result Achieved

Courts have consistently recognized that the result achieved is an important factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) ("the amount of the recovery, and end result achieved are of primary importance, for these are the true benefit to the client"); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained."), *aff'd*, 899 F.2d 21 (11th Cir. 1990).

A Settlement Fund of $5 million has been obtained through the efforts of Lead Counsel without the necessity and risk of summary judgment, trial, and appeals. This Settlement represents

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John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 724-25 (May 1986).

[8] "Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. §78u-4(a)(6).

between 8% and 22% of Lead Plaintiffs' estimate of potential damages, even though actual provable damages could have been a small fraction of these potential amounts had the case moved forward through discovery, summary judgment, and trial. Lead Counsel's pursuit of Lead Plaintiffs' claims has resulted in a substantial and certain recovery for the Settlement Class.

The notable nature of this Settlement is supported by a review of recoveries in other complex class action settlements. In contrast to the present recovery, a study by National Economic Research Associates ("NERA") states that in 2003, the median percentage of investor losses recovered in shareholder class action settlements was 2.8%, up from 2.7% in 2002. *See* Elaine Buckberg, Todd Foster, and Stephanie Plancich, *Recent Trends in Securities Class Action Litigation: 2003 Early Update*, at 8 (NERA Feb. 2004), attached as Exhibit 1 to the Declaration of Joy Ann Bull in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses ("Bull Decl."), submitted herewith. A more recent study by NERA states that in 2008, the median ratio of settlement value to investor losses was 2.7%. *See* Stephanie Plancich, Ph.D., Svetlana Starykh, *2008 Trends in Securities Class Actions*, at 14 (NERA Dec. 2008), Bull Decl., Ex. 2. When measured against the results in comparable cases, Lead Counsel achieved a very good recovery for Settlement Class Members.

Given the above, there is no doubt that Lead Counsel achieved a superior recovery for Settlement Class Members in this case and should be awarded the 25% benchmark fee requested to compensate them for such a favorable result.

2. The Risks of Litigation

Numerous cases have recognized that risk is an important factor in determining a fair fee award. *See, e.g.*, *WPPSS*, 19 F.3d at 1299-1301; *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976). Uncertainty that an ultimate recovery would be obtained is highly relevant in determining risk. *WPPSS*, 19 F.3d at 1300; *Lindy*, 540 F.2d at 117. As the court aptly observed in *King Resources*:

> The litigation also involved unique and substantial issues of law in the technical area of SEC Rule 10b-5, . . . difficult, complex and oft-disputed class action questions, and difficult questions regarding computation of damages.
>
> * * *

> In evaluating the services rendered in this case, appropriate consideration must be given to the risks assumed by plaintiffs' counsel in undertaking the litigation. The prospects of success were by no means certain at the outset, and indeed, the chances of success were highly speculative and problematical.

420 F. Supp. at 632, 636-37. *See also In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475-DT(RCx), 2005 U.S. Dist. LEXIS 13627, at *44 (C.D. Cal. June 10, 2005) ("The risks assumed by Class Counsel, particularly the risk of non-payment or reimbursement of expenses, is a factor in determining counsel's proper fee award.").

As set forth in the Joint Declaration, substantial risks and uncertainties were present from the outset of this Litigation that made it far from certain that any recovery for the Settlement Class would be obtained. While courts have always recognized that securities class actions carry significant risks, post-PSLRA rulings make it clear that the risk of no recovery (and hence no fee) has increased exponentially. Courts have noted that "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000). According to the April 2006 NERA study, dismissal rates have doubled since the PSLRA, accounting for 40.3% of dispositions. *See* Ronald I. Miller, Ph.D., Todd Foster, Elaine Buckberg, Ph.D., *Recent Trends in Shareholder Class Action Litigation: Beyond the Mega-Settlements, is Stabilization Ahead?*, at 4 (NERA Apr. 2006), Bull Decl., Ex. 3.

When cases are dismissed, the result is large losses for the plaintiffs' firms involved. There is no question that, if not settled, Lead Counsel in this case faced the substantial risk of years of litigation with no guarantee of any compensation. Lead Counsel achieved a significant recovery for the Settlement Class in the face of very substantial risks. Under these circumstances, the requested fee is fully justified.

3. The Skill Required and the Quality of the Work

The successful prosecution of these complex claims required the participation of highly skilled and specialized attorneys. *Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at *38 ("The experience of counsel is also a factor in determining the appropriate fee award."). From the outset, Lead Counsel engaged in a concerted effort to obtain the maximum recovery for the Settlement

Class. Lead Counsel demonstrated that, notwithstanding the barriers erected by the PSLRA, they would work to develop sufficient evidence to support a convincing case.

Lead Counsel's thorough investigation uncovered evidence that they believe would have ultimately defeated Defendants' motion to dismiss the amended complaint. As a result, Lead Counsel were able to negotiate a settlement they believe is fair under all the circumstances. The skill demonstrated by Lead Counsel supports the requested fee. *See, e.g.*, *J.N. Futia Co. v. Phelps Dodge Indus., Inc.*, No. 78 Civ. 4547, 1982 U.S. Dist. LEXIS 15261 (S.D.N.Y. Sept. 17, 1982).

The quality of opposing counsel is also important in evaluating the quality of the work done by plaintiffs' counsel. *See, e.g.*, *In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977); *King Res.*, 420 F. Supp. at 634; *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974). Lead Plaintiffs were opposed in this Litigation by counsel from a law firm with a nationwide reputation for vigorous advocacy of its clients' interests.

4. The Novelty and Difficulty of the Questions Presented

Courts have recognized that the novelty and difficulty of the issues in a case are significant factors to be considered in making a fee award. *See, e.g.*, *Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1306 (W.D. Wash. 2001); *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). As the *Johnson* court stated:

> Cases of first impression generally require more time and effort on the attorney's part. Although this greater expenditure of time in research and preparation is an investment by counsel in obtaining knowledge which can be used in similar later cases, he should not be penalized for undertaking a case which may "make new law." Instead, he should be appropriately compensated for accepting the challenge.

488 F.2d at 718.

Courts have properly recognized that "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *Ikon*, 194 F.R.D. at 194; *see also Goldstein v. MCI WorldCom*, 340 F.3d 238 (5th Cir. 2003) (affirming dismissal with prejudice of securities fraud class action complaint against Bernard Ebbers and WorldCom arising out of a massive securities fraud that resulted in a $685 million write-off of accounts receivable, for which Ebbers was later convicted).

In addition to being factually complex, this case also involved numerous complex questions of law under the PSLRA, in particular the application of *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005) to the facts of this case. The application of *Dura* and subsequent cases that interpret it posed significant risks to Lead Plaintiffs' ability to prevail on the issue of loss causation.

5. The Contingent Nature of the Fee and the Financial Burden Carried by Lead Counsel

A determination of a fair fee must include consideration of the contingent nature of the fee. It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner, *Economic Analysis of Law* §21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose. *WPPSS*, 19 F.3d at 1299.

Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. For example, in awarding counsel's attorneys' fees in *Prudential*, the court noted the risks that plaintiffs' counsel had taken:

> Although today it might appear that risk was not great based on Prudential Securities' global settlement with the Securities and Exchange Commission, such was not the case when the action was commenced and throughout most of the litigation. Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

In re Prudential-Bache Energy Income P'ships Sec. Litig., No. 888, 1994 WL 202394, at *6 (E.D. La. May 18, 1994).

Before plaintiffs' counsel commit to prosecute a securities class action on a contingent fee basis, an assessment of the strength of the case, the likelihood of a recovery, the probable size of damages, and the costs of litigating the case is weighed against the expectation of payment if successful. In this Circuit, plaintiffs' counsel expect to be paid a reasonable percentage of any recovery, usually in the range of 25% (absent a fee agreement with the client to seek a different

amount). Our expectation about the likely fee, if successful, is part of the equation when determining whether to pursue a case.

Moreover, there are numerous class actions in which plaintiffs' counsel took the risk, expended thousands of hours, and yet received no remuneration whatsoever despite their diligence and expertise. Subsequent to the passage of the PSLRA, a high percentage of cases in this Circuit have been dismissed at the pleading stage in response to defendants' arguments that the complaints do not meet the PSLRA's pleading standards.

Indeed, because the fee in this matter was entirely contingent, the only certainty was that there would be no fee without a successful result and that such result would only be realized after significant amounts of time, effort, and expense had been expended. Counsel for Lead Plaintiffs have received no compensation for their efforts during the course of this Litigation. Absent this Settlement, there was a sizeable risk that at the end of the day, Settlement Class Members, as well as their counsel, would obtain no recovery. Counsel for Lead Plaintiffs have risked non-payment of $186,767.89 in expenses and approximately $1 million in time worked on this matter, knowing that if their efforts were not successful, no fee would be paid. *See, e.g.*, *Winkler v. NRD Mining, Ltd.*, 198 F.R.D. 355 (E.D.N.Y.) (granting defendants' motion for judgment as a matter of law after jury verdict for plaintiffs), *aff'd sub nom. Winkler v. Wigley*, 242 F.3d 369 (2d Cir. 2000).

6. A 25% Fee Award Is Below the Average Fee Awarded in Similar Complex Class Action Litigation

A Federal Judiciary Center study released in 1996, which covered all class actions in four selected federal district courts with a high number of class actions, including this District, found that as to the size of attorneys' fees: "Median rates ranged from 27% to 30%." Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, at 69 (Federal Judicial Center 1996), Bull Decl., Ex. 4. This finding is in line with an analysis of fee awards in class actions conducted in 1996 by National Economic Research Associates, an economics consulting firm. Using data from 433 shareholder class actions, the study concludes: "Regardless of case size, fees average approximately 32 percent of the settlement." Denise N. Martin, Vinita M. Juneja, Todd S. Foster,

Frederick C. Dunbar, *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?* at 12-13 (NERA Nov. 1996), Bull Decl., Ex. 5. The benchmark fee requested is less than the average paid in these shareholder class actions.

Further, the fee requested is supported by fee awards at or above the Ninth Circuit benchmark in other class action cases:

- *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000) (upheld fee award of 33.3% of $1.725 million settlement);
- *Vizcaino*, 290 F.3d at 1047 (affirming 28% fee award);
- *Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at *61 (awarding one-third of $27.75 million settlement);
- *In re Terayon Commc'n Sys., Inc. Sec. Litig.*, No. C-00-1967-MHP, slip op. (N.D. Cal. Oct. 3, 2007) (awarded 30% of recovery, plus expenses);
- *In re AMERCO Sec. Litig.*, No. 04-2182-PHX-RJB, slip op. (D. Ariz. Nov. 2, 2006) (awarded 30% of recovery; plus expenses);
- *Broderick v. Mazur (PHP Healthcare)*, No. CV-98-1658-MRP(AJWx), slip op. (C.D. Cal. Apr. 27, 2004) (fee equal to 30% of recovery, plus expenses);
- *In re THQ, Inc. Sec. Litig.*, No. CV-00-01783-JFW(Ex), slip op. (C.D. Cal. June 30, 2003) (fee equal to 30% of recovery, plus expenses);
- *Harris v. Intel Corp.*, No. C-00-1528-CW(EMC), slip op. (N.D. Cal. July 15, 2003) (fee equal to 30% of recovery, plus expenses);
- *In re HI/FN, Inc. Sec. Litig.*, No. C-99-4531-SI, slip op. (N.D. Cal. May 20, 2003) (fee equal to 30% of recovery, plus expenses);
- *In re Dura Pharms., Inc. Sec. Litig.*, No. 99-CV-0151-JLS(WMC), slip op. (S.D. Cal. Dec. 4, 2009) (awarded fees of 25% of the fund recovered, plus expenses);
- *In re Seracare Life Sciences, Inc. Sec. Litig.*, No. 05-CV-2335-JLS(CAB), slip op. (S.D. Cal. July 17, 2009) (awarded 25% of the recovery, plus expenses);

- *In re Impax Labs., Inc. Sec. Litig.*, No. C-04-4802-JW, slip op. (N.D. Cal. May 12, 2009) (awarded 25% of recovery, plus expenses);
- *In re Sunterra Corp. Sec. Litig.*, No. 2:06-cv-00844-BES-RJJ, slip op. (D. Nev. Feb. 10, 2009) (awarded 25% of the recovery, plus expenses);
- *In re Brocade Sec. Litig.*, No. C 05-02042 CRB, slip op. (N.D. Cal. Jan. 26, 2009) (awarded 25% of the recovery, plus expenses);
- *In re Wireless Facilities, Inc. Sec. Litig.*, No. 04cv1589 NLS, slip op. (S.D. Cal. Jan. 13, 2009) (awarded 25% of the recovery, plus expenses);
- *In re PETCO Corp. Sec. Litig.*, No. 05-CV-0823 H(RBB), slip op. (S.D. Cal. Sept. 2, 2008) (awarded 25% of the recovery, plus expenses);
- *In re SeraCare Life Sciences, Inc. Sec. Litig.*, No. 05-CV-2335-H(CAB), slip op. (S.D. Cal. Sept. 4, 2007) (awarding 25% of recovery, plus expenses);
- *In re Watchguard Sec. Litig.*, No. 2:05-cv-00678-JLR, slip op. (W.D. Wash. Aug. 6, 2007) (awarded 25% of recovery, plus expenses);
- *In re Alliance Gaming Corp. Sec. Litig.*, No. CV-S-04-0821-BES-PAL, slip op. (D. Nev. June 28, 2007) (awarding 25% of the recovery, plus expenses);
- *In re Verisign, Inc. Sec. Litig.*, No. C-02-2270-JW(PVT), slip op. (N.D. Cal. Apr. 24, 2007) (awarding 25% of the recovery, plus expenses);
- *In re Charlotte Russe Holding, Inc. Sec. Litig.*, No. 04cv2528 BTM (WMc), slip op. (S.D. Cal. Aug. 30, 2006) (awarded 25% of recovery, plus expenses);
- *In re Surebeam Corp. Sec. Litig.*, No. 03-CV-01721-JM(POR), slip op. (S.D. Cal. July 17, 2006) (awarded 25% of recovery, plus expenses);
- *In re U.S. Aggregates, Inc. Sec. Litig.*, No. C-01-1688-CW, slip op. (N.D. Cal. April 6, 2006) (awarding fee of 25% of recovery, plus expenses); and
- *In re TUT Systems, Inc. Sec. Litig.*, No. C-01-2659-CW, slip op. (N.D. Cal. May 14, 2004) (fee equal to 25% of recovery, plus expenses).

The fees paid in these comparable cases support the 25% fee award requested.

7. The Customary Fee

Circuit courts and scholars have encouraged the "mimic the market" approach in setting fees in common fund class action cases. The Seventh Circuit has consistently taken this approach. *See Cont'l Ill.*, 962 F.2d at 568 ("[I]t is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order."); *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("[W]hen deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time."); *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 975 (7th Cir. 2003) ("A court must give counsel the market rate for legal services.").

Courts often look at fees awarded in comparable cases to determine if the fee requested is reasonable. *Vizcaino*, 290 F.3d at 1050 n.4. If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery. *Blum*, 465 U.S. at 903* ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers.") (concurring); *In re M.D.C. Holdings Sec. Litig.*, No. CV 89-0090 E (M), 1990 U.S. Dist. LEXIS 15488, at *22 (S.D. Cal. Aug. 30, 1990) ("In private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total recovery."); *Ikon*, 194 F.R.D. at 194 (same). Thus, the customary contingent fee in the private marketplace – 30% to 40% of the fund recovered – is much higher than the percentage fee requested in this case.[9]

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[9] Professor Conte acknowledged the propriety of adequately compensating counsel based on the result obtained in common fund cases:

> [C]ourts have been careful to award a fully compensable reasonable fee based on the underlying economic inducement for class action lawyers to pursue potentially expensive or complex common fund class litigation. These lawyers assume the risk of no compensation unless they successfully confer common fund benefits on the class, based on their reasonable expectation that they will share in the recovery in a fair proportion, in contrast to receiving a fee based initially on time-expended criteria that fail to give the ***results obtained*** factor primary consideration.

The customary fee in contingent litigation supports a benchmark fee award of 25% as fair and reasonable.

8. Reaction of the Settlement Class Supports Approval of the Attorneys' Fees Requested

The Court-approved notice was sent to over 50,000 potential Settlement Class Members and the Court-approved summary notice was published in *Investor's Business Daily*. *See* paragraphs 3 through 11 to the Declaration of Carole K. Sylvester Re A) Mailing of the Notice of Proposed Settlement of Class Action and the Proof of Claim and Release Form, and B) Publication of the Summary Notice, submitted herewith. To date, no objections to the requested amount of attorneys' fees and expenses have been received.[10] The Third Circuit recently noted that a low level of objections is a "rare phenomenon." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005). Moreover, as this Circuit has held, a small number of objections do not stand in the way of approval of a reasonable fee. *See Mego Fin.*, 213 F.3d at 459; *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

IV. THE REQUESTED FEE IS REASONABLE UNDER A LODESTAR CROSS-CHECK

The first step in applying the lodestar cross-check is to determine the dollar value of the proposed percentage fee award. Here, counsel request a fee of $1,250,000. The next step requires the court to ascertain the lodestar figure by multiplying the number of hours worked by the hourly rate of counsel. The court then can determine an implied multiplier that may be assessed for reasonableness by taking into account the contingent nature and risks of the litigation, the results obtained, and the nature of and quality of the services rendered by plaintiffs' counsel. *See, e.g.*, *Hensley*, 461 U.S. 424. Indeed, "'courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases.'" *Vizcaino*, 290 F.3d at 1051 (citation omitted).

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1 Alba Conte, *Attorney Fee Awards* §1.09, at 16 (2d ed. 1993) (emphasis in original).

[10] The last day to file an objection is February 4, 2010. If any objections are received, Lead Counsel will address them in a reply brief.

The cumulative hours expended by Lead Counsel in this Litigation are 2,273.95 and the resulting lodestar for the services performed is $1,014,591.50.[11] Thus, the requested fee represents a modest multiplier of 1.23 of Lead Counsel's lodestar.

In other complex litigation, it is common for courts to enhance the lodestar by multipliers between 3.0 and 4.5 and many courts have awarded higher multipliers. *See, e.g.*, *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) ("'In recent years multipliers of between 3 and 4.5 have been common' in federal securities cases.") (citation omitted); *Rabin v. Concord Assets Group*, No. 89 CIV 6130 (LBS), 1991 U.S. Dist. LEXIS 18273, at *4 (S.D.N.Y. Dec. 19, 1991) (multipliers between 3 and 4.5 have been common in recent years); *Vizcaino*, 290 F.3d at 1051 (finding multipliers ranged as high as 19.6, though most run from 1.0 to 4.0); *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 998-99 (D. Minn. 2005) (awarding 25% of $80 million settlement fund, representing 4.7 multiplier); *In re Charter Commc'ns, Inc., Sec. Litig.*, No. MDL 1506, 2005 U.S. Dist. LEXIS 14772, at *56 (E.D. Mo. June 30, 2005) (awarding 20% of $146 million settlement fund, representing 5.6 multiplier); *In re Rite Aid Corp. Sec. Litig.*, 269 F. Supp. 2d 603, 611 (E.D. Pa. 2003) (awarding fee equal to multiplier of 4.07 and recognizing that "'multipliers in this range are fairly common'") (citation omitted), *vacated on other grounds*, 396 F.3d 294 (3d Cir. 2005); *In re Aetna Inc. Sec. Litig.*, No. MDL 1219, 2001 U.S. Dist. LEXIS 68, at *59 (E.D. Pa. Jan. 4, 2001) (awarding 30% of $82.5 million settlement fund, representing 3.6 multiplier); *In re DaimlerChrysler Sec. Litig.*, No. 00-993/00-984/01-004 (JJF), slip op. (D. Del. Feb. 5, 2004) (awarding 22.5% of $300 million settlement fund, representing 3.2508 multiplier); *In re CVS Corp. Sec. Litig.*, No. 01-11464 (JLT), slip op. (D. Mass. Sept. 7, 2005) (awarding 25% of $110 million settlement fund, representing 3.27 multiplier); *In re Buspirone Antitrust Litig.*, No. MDL 1413 (JGK), 2003 U.S. Dist. LEXIS 26538, at *11 (S.D.N.Y. Apr. 17, 2003) (awarding multiplier of 8.46); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 198 (S.D.N.Y. 1997) (awarding multiplier of 5.5); *Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1304 (D.N.J. 1995) (awarding fee equal to multiplier

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[11] *See* the declarations of Lead Counsel, filed herewith.

of 9.3); *In re RJR Nabisco, Inc. Sec. Litig.*, No. MDL 818 (MBM), 1992 U.S. Dist. LEXIS 12702 (S.D.N.Y. Aug. 24, 1992) (awarding fee equal to multiplier of 6.0). *See also In re Shell Oil Refinery*, 155 F.R.D. 552, 573-74 (E.D. La. 1993) (multiplier of 3.25); *Keith v. Volpe*, 501 F. Supp. 403, 414 (C.D. Cal. 1980) (multiplier of 3.5); *Brewer v. S. Union Co.*, 607 F. Supp. 1511 (D. Colo. 1984) (multipliers of 3 and 3.5); *Mun. Auth. of Bloomsburg v. Pennsylvania*, 527 F. Supp. 982, 999-1000 (M.D. Pa. 1981) (4.5 multiplier); *In re Cenco, Inc. Sec. Litig.*, 519 F. Supp. 322, 326-28 (N.D. Ill. 1981) (4 multiplier). Consequently, the attorneys' fees sought are plainly reasonable using a lodestar cross-check.

V. LEAD COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Lead Counsel have incurred expenses in an aggregate amount of $186,767.89 in prosecuting the Litigation. These expenses are set forth in Lead Counsel's declarations submitted to the Court herewith.

The appropriate analysis to apply in deciding which expenses are compensable in a common fund case of this type is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'") (citation omitted). *See also In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996). Therefore, it is proper to reimburse reasonable expenses even though they are greater than taxable costs. *Id. See also Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. 1993) (expenses reimbursable if they would normally be billed to client); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995) (expenses recoverable if customary to bill clients for them); *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) ("Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they 'were incidental and necessary to the representation' of those clients.") (citation omitted). The categories of expenses for which counsel seek reimbursement are the type of expenses routinely charged to hourly paying clients and, therefore, should be reimbursed out of the common fund.

Expenses include the costs of computerized research. These are the charges for computerized factual and legal research services such as LEXIS/Nexis and Westlaw. It is standard practice for attorneys to use LEXIS/Nexis and Westlaw to assist them in researching legal and factual issues and reimbursement is proper. *See Media Vision*, 913 F. Supp. at 1371. Indeed, courts recognize that these tools create efficiencies in litigation and, ultimately, save clients and the class money. *See Cont'l Ill.*, 962 F.2d at 570. In approving expenses for computerized research, the court in *Gottlieb v. Wiles*, 150 F.R.D. 174, 186 (D. Colo. 1993), *rev'd and remanded on other grounds sub nom. Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994), underscored the time-saving attributes of computerized research as a reason reimbursement should be encouraged. The court also noted that fee-paying clients reimburse counsel for computerized legal and factual research. *Id.*

In addition, certain counsel were required to travel in connection with this case. The expenses in this category are reasonable in amount, and are properly charged against the fund created. *See Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1244 (9th Cir. 1982), *vacated and remanded on other grounds*, 461 U.S. 952 (1983); *In re McDonnell Douglas Equip. Leasing Sec. Litig.*, 842 F. Supp. 733, 746 (S.D.N.Y. 1994); *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 741 F. Supp. 84, 86 (S.D.N.Y. 1990).

Photocopying costs are also customarily reimbursed in common fund cases. *See McDonnell Douglas*, 842 F. Supp. at 746. Duplication of documents and pleadings was necessary for the effective prosecution of this case.

VI. CONCLUSION

From the beginning, Lead Plaintiffs were faced with determined adversaries represented by experienced counsel. Without any assurance of success, Lead Plaintiffs and their counsel pursued this Litigation to a successful conclusion. Accordingly, we submit that for the reasons set forth above and in the Joint Declaration, the Court should award Lead Counsel attorneys' fees of 25% of the Settlement Fund and reimbursement of $186,767.89 in expenses.

DATED: January 21, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I further certify that I caused this document to be forwarded to the following Designated Internet Site at: http://securities.stanford.edu.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 21, 2010.

s/ Joy Ann Bull
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